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ARTICLE

Harm to Workers in EU Competition Law: A Sufficient Condition for Intervention

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Abstract

While there is growing evidence that employers hold substantial market power and that workers suffer from worsened working conditions as a result, interventions against employer conduct through EU competition law remain limited. A possible reason for this reserved approach is the predominance of consumer welfare as the objective of the law. To be sure, harm inflicted on workers by employers may under certain circumstances translate also into harm to downstream consumers. But in other cases the effect on consumers may be neutral or even positive. Against this background, this Article offers two lines of argument for EU competition law to recognize harm suffered by workers from restricted competition between employers as a form of harm relevant in itself. First, the Article argues that harm to any market counterparty, including workers, is a sufficient condition for intervention. Second, in the alternative, the Article argues that at least harm to individuals at the edges of supply chains, that is final consumers as well as workers, warrants action. In any case, EU competition law should not be more Catholic than the Pope: The pursuit of consumer welfare, as an objective borrowed from U.S. antitrust, should not lead to less intervention against employer conduct than we see in the United States.

Keywords: EU competition law; labor antitrust; employer power; worker welfare; consumer welfare

A. Introduction

There are over 220 million people in the EU labor force.[1] They provide their physical and/or mental effort to businesses, who purchase the effort as one of their production inputs and in return pay wages. While this type of input is undeniably an extraordinary one in that it is inseparable from the human being,[2] the economic reality is that "labor markets are markets that respond to the logic of supply and demand as well as any other market."[3] This means, among other things, that workers benefit when employers compete fiercely for their services because such competition leads to more favorable working conditions including higher wages. Conversely, when there is less competition between employers, working conditions tend to be worse.[4]

[1] *Labor Force, Total – European Union*, WORLD BANK GRP., https://data.worldbank.org/indicator/SL.TLF.TOTL.IN?locations=EU (last accessed Dec. 20, 2024).

[2] *See* KARL POLANYI, THE GREAT TRANSFORMATION 75 (2nd ed. 2001).

[3] Mariateresa Maggiolino, *The Application of Competition Law to Labour Markets: Some Unresolved Issues*, 11 J. ANTITRUST ENF'T 127, 130 (2023).

[4] *See* Ariel Ezrachi, Amit Zac & Christopher Decker, *The Effects of Competition Law on Inequality – An Incidental By-Product or a Path for Societal Change?*, 11 J. ANTITRUST ENF'T 51, 56 (2022).

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Until recently, competition between employers had generally been believed sufficiently fierce.[5] New economic research has nevertheless shown that labor markets actually tend to be significantly concentrated and employers often have substantial market power.[6] A recent inquiry then specifically found that a sizeable share of European workers do find themselves in concentrated labor markets.[7] An ever-growing number of studies further show that workers are actually being exploited[8] because they obtain a significantly lower share of their productivity than they would if employers competed vigorously.[9] For instance, a UK study found that workers offering their labor in the most concentrated decile of labor markets earn roughly ten percent less than comparable workers working for comparable employers in the least-concentrated decile.[10] The market power of employers is also often associated with economic inequality in society. This is because the absence of significant competition from other employers allows businesses to extract wealth from workers. At the same time, poor people receive their income primarily for their labor while rich people more often also have income from capital.[11]

A field of law that possesses the tools to address market concentration and power, possibly including in labor markets, is competition law. Yet, as observed by Ezrachi et al., competition laws around the world are generally rarely enforced against employers.[12] This concerns also EU competition law with the Commission as its primary enforcer.[13] Araki et al. note that "up until recent years, there had been practically no enforcement" in this area.[14] To be sure, EU competition laws are written in vague language, which itself poses little obstacle to intervening against actions by employers that lead to and/or take advantage of weak competition between them—"restrictions of competition"—including agreements between employers, abuse of dominance by employers, and mergers between employers. It is also true that there have been some interventions by national competition authorities against the most flagrant restrictions of competition between employers in the form of wage-fixing and no-poach agreements.[15] These cases nevertheless remain rare and tend to focus on specialized settings such as professional sports.[16] In any case, there has so far been

[5]*See* Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 541–42 (2018); Eric A. Posner, *Introduction to the Symposium on Labor Market Power*, 90 U. CHI. L. REV. 261, 261 (2023).

[6]*See, e.g.*, Herbert Hovenkamp, *Worker Welfare and Antitrust*, 90 U. CHI. L. REV. 511, 528 (2023) ("In the economy as a whole, labor market concentration is, if anything, greater than product-market concentration, particularly at the lower end of the wage scale."); Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1038–39 (2019); Naidu et al., *supra* note 5, at 560–69; ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 24–28 (2021).

[7]*See generally* Satoshi Araki, Andrea Bassanini, Andrew Green, Luca Marcolin & Cristina Volpin, *Labor Market Concentration and Competition Policy Across the Atlantic*, 90 U. CHI. L. REV. 339 (2023).

[8]*See* Firat Cengiz, *The Conflict Between Market Competition and Worker Solidarity: Moving from Consumer to a Citizen Welfare Standard in Competition Law*, 41 LEGAL STUD. 73, 79 (2021) (using the term "exploitation").

[9]Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits*, 90 U. CHI. L. REV. 273, 285–86 (2023); Hovenkamp, *supra* note 6, at 533; Marinescu & Hovenkamp, *supra* note 6, at 1042.

[10]COMPETITION & MKTS. AUTH., COMPETITION AND MARKET POWER IN UK LABOUR MARKETS (2024).

[11]Naidu et al., *supra* note 5, at 537 (observing that wage suppression "reduces the incomes of workers relative to those of people who live off capital, and the latter are almost uniformly higher earners than the former").

[12]Ezrachi et al., *supra* note 4, at 62.

[13]CRISTINA VOLPIN & CHRIS PIKE, ORG. FOR ECON. CO-OPERATION & DEV., COMPETITION IN LABOUR MARKETS 19 (2020). In fact, this is true about enforcement against buyers more generally. *Id. See also* Ariel Ezrachi & Maria Ioannidou, *Buyer Power in European Union Merger Control*, 10 EUR. COMPETITION J. 69, 74 (2014) ("In practice, buyer power has attracted limited scrutiny under European competition law.").

[14]Araki et al., *supra* note 7, at 340.

[15]*See, e.g.*, Satoshi Araki, Andrea Bassanini, Andrew Green, Luca Marcolin & Cristina Volpin, *Labor Markets Are the New Frontier for Competition Policy*, PROMARKET (July 28, 2023), https://www.promarket.org/2023/07/28/labor-markets-are-the-new-frontier-for-competition-policy/; Anastasiia Panchak, *Cartels in Labour Markets on the Radar in 2022: Recent Investigations in Europe and Practical Tips for Businesses*, KLUWER COMPETITION LAW BLOG (Mar. 4, 2023), https://competitionlawblog.kluwercompetitionlaw.com/2023/03/04/cartels-in-labour-markets-on-the-radar-in-2022-recent-investigations-in-europe-and-practical-tips-for-businesses/; Ana Sofia Rodrigues, Marta Rocha & Sónia Moura, *Anticompetitive Agreements in Labour Markets: A Survey of the Most Recent Developments in EU Competition Law*, 15 J. EUR. COMPETITION L. & PRAC. 141 (2024).

[16]For a similar observation concerning the United States, see Naidu et al., *supra* note 5, at 540, 543–44, 570.

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no actual intervention by the European Commission,[17] and the applicability of EU competition law to employer conduct has not been addressed by the Court of Justice as the ultimate interpreter of EU law either.[18]

A possible obstacle to enforcement against employer conduct harming workers is that, under an influential account of EU competition law known as the consumer welfare paradigm, the law supposedly protects—the welfare of—consumers, not workers. Of course, the objectives of the law keep being discussed and some argue that "cracks have started to emerge" in "the broad acceptance of [the law's] economic focus."[19] The consumer welfare paradigm nevertheless appears well entrenched. For instance, the Court of Justice has recently declared in its *Servizio Elettrico Nazionale* judgment that the "ultimate objective" of Article 102 of the Treaty on the Functioning of the European Union ("TFEU")—and arguably of EU competition law as a whole[20]—is "the well-being of . . . consumers."[21] To be sure, competitive harm to workers does sometimes go hand in hand with harm to consumers.[22] These are the easy cases because protection of workers against employers is then readily reconcilable with the consumer welfare paradigm: Workers can be protected in order to protect consumers.[23] In other cases, nevertheless, competitive harm to workers does actually have no effect on consumers or even benefits them.[24] Due to the consumer welfare paradigm, such cases have sometimes been argued not to warrant competition law intervention.[25] In any case, "[i]t remains to

[17]Although the Commission has not intervened, there is some recent momentum for official Commission action. For example, in October 2021, Margrethe Vestager, as the EU Commissioner for Competition, did highlight wage-fixing and no-poach agreements as highly undesirable. *See* Margrethe Vestager, Eur. Competition Comm'r, Address at the Italian Antitrust Association Annual Conference: A New Era of Cartel Enforcement (Oct. 21, 2021). In the summer of 2024, the Commission reported that it started its first ever formal investigation into no-poach agreements. European Commission Press Release IP/24/3908, Commission Opens Investigation into Possible Anticompetitive Agreements in the Online Food Delivery Sector (July 23, 2024). Even more recently, the Commission carried out unannounced inspections at the premises of companies active in the data-center-construction sector in connection to possible no-poach agreements. European Commission Press Release IP/24/5926, Commission Carries Out Unannounced Antitrust Inspections in the Data Centre Construction Sector (Nov. 18, 2024).

[18]One could argue that cases concerning the rules of sport association over athletes' eligibility to compete, such as ECJ, Case C-124/21 P, Int'l Skating Union v. Comm'n, ECLI:EU:C:2023:1012 (Dec. 21, 2023), https://curia.europa.eu/juris/liste.jsf?num=C-124/21, do exhibit an employment aspect. *See* Julia von Eitzen Peretz, *Competition Law and No-Poach Agreements: Developments in Europe*, HAUSFELD (May 20, 2022), https://www.hausfeld.com/fr-be/what-we-think/competition-bulletin/competition-law-and-no-poach-agreements-developments-in-europe/ (making this argument).

[19]Marios Iacovides & Konstantinos Stylianou, *The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy*, 3 EUR. L. OPEN 587, 588 (2024).

[20]Opinion of Advocate General Rantos at para. 99, Case C-377/20, Servizio Elettrico Nazionale SpA v. Autorità Garante della Concorrenza e del Mercato (Dec. 9, 2021).

[21]ECJ, Case C-377/20, Servizio Elettrico Nazionale SpA v. Autorità Garante della Concorrenza e del Mercato, ECLI:EU:C:2022:379 (May 12, 2022), para. 46, http://curia.europa.eu/juris/liste.jsf?num=C-377/20 (referring to para. 100 of Advocate General Rantos's opinion).

[22]Eric A. Posner, *Enforcement of US Antitrust Law in Labour Markets*, 11 J. ANTITRUST ENF'T 259, 260 (2023) ("Some commentators have argued that labour antitrust is redundant because any anticompetitive act that causes harm to workers will also cause harm to consumers and thus be an antitrust violation that can be challenged on the consumers' behalf."). *See infra* notes 97–101 and accompanying text.

[23]*Cf.* C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2087 (2018).

[24]*Infra* notes 102–115 and accompanying text.

[25]Einer Elhauge, *Should the Competitive Process Test Replace the Consumer Welfare Standard?*, PROMARKET (May 24, 2022), https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/. *See also* Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, 38–39 (2021) ("[C]onsider a merger between two large employers that harms workers by creating or enhancing employer buyer power in a local labor market. This merger lessens competition among employers for workers . . . But a sensible person might well query whether the merger is a problem under the 'consumer welfare standard.'"); Martijn Snoep, *Speech: Labor Markets, Competition Law's Long Neglected Corner*, AUTH. FOR CONSUMERS & MKTS. (June 21, 2022), https://www.acm.nl/en/publications/speech-labor-markets-competition-laws-long-neglected-corner ("[S]ome have suggested that the 'consumer welfare standard' stands in the way of competition enforcement against practices on the demand side of the labor market."). *Cf.* Debbie Feinstein & Albert Teng, *Buyer Power: Is Monopsony the New Monopoly*, 33 ANTITRUST 12, 13 (2019) ("[S]ome argue that unless it can be shown that

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be seen whether the protection of workers [themselves] will be included in any future enforcement cases in Europe ...."[26]

Against this background, the present Article puts forward arguments for EU competition law to recognize harm suffered by workers from restricted competition[27] between employers[28] as a form of harm relevant *in itself*. Or, to use a phrase from the *Servizio Elettrico Nazionale* judgment, for EU competition law to regard also the well-being of workers as an "ultimate objective warranting the intervention of competition law."[29] The arguments put forward in this Article do not challenge the welfarist conception of competition law. To be sure, one could advocate for the protection of workers through competition law by calling this conception into question in the first place. For instance, the law can be argued to protect "competition as such," "the competitive process," or "an efficient competition structure" of the market.[30] An intervention against conduct restricting competition between employers would then be most directly motivated by the "harm" inflicted on competition, the process, or the structure rather than on workers themselves. It is nevertheless a question how effective this argumentative strategy would be given that the Court clearly stated in *Servizio Elettrico Nazionale* that such concepts are only a proxy[31] for the ultimate objective of people's well-being.[32] The concepts have moreover been criticized for being too indeterminate to guide decision-making.[33] In any case, this Article focuses on arguments in favor of protecting workers that are reconcilable with a welfarist approach to competition law. They draw on suitable

there will be some ... detrimental effect on consumers ... we should not worry about monopsony conduct."); RICHARD MAY & JUNHEON LEE, ORG. FOR ECON. CO-OPERATION & DEV., PURCHASING POWER AND BUYER'S CARTELS 8 (2022) ("Under [the consumer welfare] standard, intervention is generally only justified when it prevents harm, or promotes benefits, to consumers."); *infra* notes 154–156 and accompanying text.

[26]Tilman Kuhn, Kathryn Mims, Strati Sakellariou-Witt & Jaclyn Phillips, *Emerging Insights on Antitrust Issues in Labor Markets: Growing International Enforcer Concern for Worker Welfare*, 4 CONCURRENCES 15, 16 (2023). *See also* VOLPIN & PIKE, *supra* note 13, at 20 ("[T]ime will reveal if authorities and courts will become more active in their enforcement in labour markets, by looking at the competition in this input market also regardless of any impact on consumer welfare as narrowly interpreted.").

[27]Worker harm emanating from sources other than restricted competition is not considered here. That is to say that this Article does not concern itself for example with the public interest objective of protecting employment. *See, e.g.*, VOLPIN & PIKE, *supra* note 13, at 20–21. In other words, the focus here is on traditional, competition-related harm. *See, e.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 178 (2019) ("As in all antitrust cases, restrictions on competition are a predicate for finding harm; harm to suppliers matters only when it results from conduct limiting competition, not from any other sources."). *Cf.* Suzanne Kingston, *Integrating Environmental Protections and EU Competition Law: Why Competition Isn't Special*, 16 EUR. L.J. 780, 790 (2010) (arguing that competition laws that "expressly apply only to competitive restrictions" cannot prohibit behavior that is environmentally damaging but does not restrict competition).

[28]Workers may be harmed also by their employers facing less competition downstream on product markets. *See, e.g.*, Alexander & Salop, *supra* note 9, at 325–30; Ezrachi et al., *supra* note 4, at 55; Hovenkamp, *supra* note 6, at 521. This relationship between workers and competition law is, nevertheless, mostly beyond the scope of the present Article.

[29]*Servizio Elettrico Nazionale*, Case C-377/20 at para. 46. Please note that it is a separate question whether and how harm to workers should eventually be balanced against benefits to consumers. This question is addressed by the present Article only preliminarily in its conclusion. *See infra* notes 241–241 and accompanying text.

[30]*See, e.g.*, Araki et al., *supra* note 7, at 363; Kuhn et al., *supra* note 26, at 15; VOLPIN & PIKE, *supra* note 13, at 19; Snoep, *supra* note 25.

[31]*See* Andriani Kalintiri, *Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Assumptions*, 16 J. COMPETITION L. & ECON. 392, 396 (2020) (explaining that proxies are "substitute[s] for determining something that one may not assess directly, whether at all or easily so").

[32]*See Servizio Elettrico Nazionale*, Case C-377/20 at paras. 46–47; Assimakis Komninos, *'Consumer Welfare' and the EU Courts: An Unexpected Refuge for a Persecuted Concept?*, *in* ANTITRUST AND THE BOUNDS OF POWER – 25 YEARS ON 73, 85 (Oles Andriychuk ed., 2023) (noting that, according to the *Servizio Elettrico Nazionale* judgment, "the protection of an 'effective competitive structure' is seen more as a proxy for that broader ultimate objective" of protecting consumers). *See also* Opinion of Advocate General Rantos, *supra* note 20, at para. 96 ("[T]here is no logical reason to protect the competitive market, in the abstract, if there is no (actual or potential) risk of harm to consumers.").

[33]*See, e.g.*, John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2427 (2013).

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understandings of the very consumer welfare paradigm and on its application within competition law of the European Union and also of the United States as the birthplace of the paradigm.[34]

The Article is organized as follows. Section B provides a conceptual framework for the rest of the Article by presenting consumer welfare as the predominant objective of EU competition law and by explicating the relationships between the welfare of various groups of market actors. Section C offers two lines of argument regarding why EU competition law should treat harm to workers as an intrinsically relevant reason for intervention. First, the law should intervene against business conduct inflicting competitive harm on any market counterparty for the benefit of those counterparties themselves. Second, in the alternative, the law should protect at least the individuals at the edges of the supply chain.[35] Section D concludes by summarizing and calling on EU competition law to protect workers for their own sake.

B. Competition Law and Welfare

This section provides a conceptual framework to be used by the following core part of the Article. It first tracks how consumer welfare has become the main objective of EU competition law and what this objective means. Subsequently this section discusses the various notions of welfare and the relationships between these notions. And, finally, it briefly addresses the connection between welfarist objectives of competition law and its substantive tests.

I. Consumer Welfare as the Predominant Objective of EU Competition Law

There is no complete consensus as to the objective(s) (to be) pursued by EU competition law.[36] To be sure, Protocol 27 to the Treaty on European Union states that the internal market to be established by the European Union pursuant to Article 3(3) of the Treaty "includes a system ensuring that competition is not distorted ...."[37] Yet, "the Treaty does not say explicitly *why* competition is a good thing, nor what the competition rules are supposed to achieve."[38] As a result, various goals have been attributed to this field of law over the years. These include for instance ensuring economic freedom, promoting fairness and equality, and advancing market integration.[39]

Nevertheless, since the "modernization" of EU competition law, which took place in the 1990s and 2000s, its predominant objective has become the protection of welfare, and especially that of consumers.[40] In its most basic economics-based understanding, consumer welfare corresponds

[34]*See* Victoria Daskalova, *Consumer Welfare in EU Competition Law: What Is It (Not) About?*, 11 COMPETITION L. REV. 133, 134 (2015) ("Consumer welfare was first introduced in US antirust law and was subsequently adopted in other jurisdictions ...."). *See also* notes 46–48 and accompanying text.

[35]One part of this section touches upon the question of whether actions of workers can violate EU competition law. This question is discussed only insofar as it sheds light on violating the law by employers. It is not an object of this Article in its own right.

[36]*See, e.g.*, ALISON JONES, BRENDA SUFRIN & NIAMH DUNNE, EU COMPETITION LAW: TEXT, CASES, AND MATERIALS 42 (7th ed. 2019); Konstantinos Stylianou & Marios Iacovides, *The Goals of EU Competition Law: A Comprehensive Empirical Investigation*, 42 LEGAL STUD. 620, 621 (2022).

[37]Consolidated Version of the Treaty on European Union Protocol 27, May 9, 2008, 2008 O.J. (C 115) 309. *See also* Council Regulation 1/2003, recital 9, 2003 O.J. (L 1) 1, 2 (EC) ("Articles [101 and 102 TFEU] have as their objective the protection of competition in the market.") [hereinafter TFEU].

[38]RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 17 (10th ed. 2021) (emphasis in original). *See also* JONES ET AL., *supra* note 36, at 42 ("[T]here are various possible goals of competition laws and which of these EU competition law should pursue is still debated after more than 60 years."); RENATO NAZZINI, THE FOUNDATIONS OF EUROPEAN UNION COMPETITION LAW: THE OBJECTIVE AND PRINCIPLES OF ARTICLE 102 at 12 (2011) ("The Treaties do not make clear which objective or objectives must be ascribed to the EU competition rules.").

[39]*See* Stylianou & Iacovides, *supra* note 36, at 621.

[40]*E.g.*, Ezrachi & Ioannidou, *supra* note 13, at 72 ("It is common ground that consumer welfare has served as a fundamental goal for competition enforcement in Europe."); Jens-Uwe Franck, *The Directive on Unfair Trading Practices in the Agri-Food*

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with consumer surplus, which is the difference between how much a final consumer of a product would be maximally willing to pay for the product and how much she actually pays for it. The focus is then usually on the aggregate surplus of—mostly many—consumers purchasing the same product. This aggregate surplus is obviously bigger when prices are lower and the number of units purchased, "output," is higher.[41] Conversely, price increases and output restrictions, as common outcomes of less fierce competition, decrease the surplus enjoyed by consumers and, thus, constitute their harm.

The introduction of consumer welfare into EU competition law is associated mainly with the European Commission, and in particular its Directorate-General for Competition, as the body responsible for competition policy and its enforcement. This introduction formed part of the substantive branch of the modernization process,[42] known as the "more economic" or "effects-based" approach to EU competition law.[43] This approach was at least in part motivated by criticism from academics, practitioners, and competition officials that often painted competition law of the European Union as lagging behind that of the United States.[44] The U.S. economy was seen as more competitive and the U.S. model of competition law as intellectually convincing.[45] Part of this model was a pursuit of welfare—and in particular that of consumers[46]—as the main objective. Thus, while this was not necessarily formally recognized,[47] adopting consumer welfare by EU competition law meant moving closer to U.S. law.[48] This is to say that understanding the role of welfarist objectives in U.S. antitrust may help us better understand also their position in EU competition law.

The more economic approach entailed, among other things, interpreting substantive rules across all three domains of competition law—that is, Article 101 TFEU, Article 102 TFEU, and the Merger Control Regulation[49]—as aiming to address competition-related harm to consumers.[50] Next to speeches by a number of EU Commissioners for Competition,[51] the pursuit of this objective has been enshrined also in various pieces of the Commission's soft law. For instance, the 2004 guidelines on applying Article 101(3) TFEU posit that "[t]he objective of Article [101] is to protect competition on the market as a means of enhancing consumer welfare ...."[52] The 2023

Supply Chain: Regulatory Ambitions and Legal Instruments, 4 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 843, 850 (2021) (noting that EU "competition law is, first and foremost, concerned with the protection of consumer welfare"); NAZZINI, *supra* note 38, at 44 ("In practice ... consumer welfare has been advocated as the appropriate objective of competition law by academics, practitioners, business, and competition officials.").

[41]*See, e.g.*, Hovenkamp, *supra* note 6, at 531 ("Consumer welfare is a function of output multiplied by the surplus that customers receive on each transaction."). *But see infra* note 72.

[42]On the distinction between substantive and procedural modernization of EU competition law, see generally David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 FORDHAM INT'L. L.J. 1235 (2008).

[43]Laura Parret, *Shouldn't We Know What We Are Protecting? Yes We Should!: A Plea For a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy*, 6 EUR. COMPETITION J. 339, 357–58 (2010).

[44]*See* ANNE C. WITT, THE MORE ECONOMIC APPROACH TO EU ANTITRUST LAW 10–11 (2016) (describing these criticisms).

[45]*See* Gerber, *supra* note 42, at 1260; Ioannis Kokkoris & Athanassios Skourtis, *Is Consumer Welfare Still Fit for Purpose in the EU Competition Regime?*, *in* RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF COMPETITION ENFORCEMENT 410, 413 (Ioannis Kokkoris & Claudia Lemus eds., 2022) ("[T]he European Commission seems to have embraced the consumer welfare paradigm in what seems to be an effort to emulate *mutatis mutandis* the US antitrust approach ....").

[46]*See* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 16 (2016) ("[C]onsumer welfare is the more dominant paradigm, especially in the courts, but even among scholars."); WITT, *supra* note 44, at 81–82 ("The US judiciary overwhelmingly considers consumer welfare the true objective of US antitrust law these days.").

[47]*See* Andre Fiebig, *Modernization of European Competition Law as a Form of Convergence*, 19 TEMP. INT'L & COMPAR. L.J. 63, 63 (2005) ("Although the European Commission has not formally recognized convergence with U.S. antitrust law as one of the objectives of the modernization process, it will be one of the unintended results.").

[48]*See* Gerber, *supra* note 42, at 1259; Kokkoris & Skourtis, *supra* note 45, at 413.

[49]Council Regulation 139/2004, 2004 O.J. (L 24) 1 (EC).

[50]*See, e.g.*, Pınar Akman, *"Consumer" Versus "Customer": The Devil in the Detail*, 37 J.L. & SOC'Y 315, 316 (2010).

[51]*See, e.g.*, Parret, *supra* note 43, at 357.

[52]Commission Guidelines on the Application of Article 81(3) of the Treaty, para. 13, 2004 O.J. (C 101) 97, 98 (EU) [hereinafter *Guidelines on Article 101(3) TFEU*].

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guidelines on horizontal cooperation agreements similarly say that Article 101 TFEU aims to ensure that businesses do not restrict competition "to the ultimate detriment of consumers."[53] The 2009 guidance on the Commission's enforcement priorities in applying Article 102 TFEU to exclusionary conduct states that "the Commission will focus on those types of conduct that are most harmful to consumers ...."[54] The draft guidelines on the application of Article 102 TFEU published by the Commission in 2024 then state the following: "Pursuant to the Union Courts' case law, Article 102 TFEU applies to all practices by dominant undertakings which may directly or indirectly harm the welfare of consumers ...."[55] And the guidelines on the assessment of horizontal mergers say that the relevant negative effect of a merger is the "potential harm to consumers" caused by a less intensive post-merger competition.[56]

Harm to consumers may arise from exploitative as well as exclusionary business conduct.[57] Exploitative conduct harms consumers directly. It consists for instance in the charging of excessive prices discussed above. Exclusionary conduct forecloses competitors, which allows a subsequent exploitation of consumers. This is to say that a competition law system protecting consumer welfare does not intervene against business conduct harming rivals for the sake of the rivals themselves but only insofar as the conduct is detrimental also to consumers. As a matter of fact, "many forms of legitimate competition harm rivals but benefit customers."[58] Articles 101 and 102 TFEU as well as the Merger Control Regulation address both exploitative and exclusionary conduct.

The Commission understands consumer welfare more broadly than captured by the basic account presented above. In particular, the metrics of welfare are not only price and output. Instead, the Commission appreciates that consumers may also benefit from being able to choose between multiple products. Products may moreover vary in terms of their quality. And producers are able to improve over time how their products satisfy the needs of consumers. That is why the Commission recognizes greater choice, higher quality and more product innovation as contributing to greater consumer welfare.[59] To be sure, the Commission does in its communication often focus only on price increases. This is nevertheless just for tractability purposes with the other dimensions of consumer welfare still being implicitly included.[60] This approach is followed also by the present Article, including as regards wage as the price of labor: A decrease in wages is to be understood as any worsening of working conditions.[61]

Of course, it is not the Commission but the Court of Justice that has the ultimate say about the correct interpretation of EU competition law, including its objectives. The Court has nevertheless

[53]Commission Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, para. 9, 2023 O.J. (C 259) 1, 8 (EU) [hereinafter *Guidelines on Horizontal Cooperation*]. *See also id.* at para. 518 ("Competition law enforcement ... ensur[es] effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare.").

[54]Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 5, 2009 O.J. (C 45) 7, 7 (EU) [hereinafter *Enforcement Guidance on Article 102 TFEU*].

[55]*Draft Guidelines on the Application of Article 102 of the Treaty on the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings*, para. 5, EUR. COMM'N, https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en (last accessed Dec. 23, 2024) [hereinafter *Draft Guidelines on Article 102 TFEU*].

[56]Commission Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, para. 76, 2004 O.J. (C 31) 5, 13 (EU) [hereinafter *EU Horizontal Merger Guidelines*].

[57]These terms are usually used only in the context of abuse of dominance. It nevertheless makes sense to invoke them also when discussing agreements and mergers.

[58]Shapiro, *supra* note 25, at 38.

[59]JONES ET AL., *supra* note 36, at 48.

[60]*See, e.g.*, *Enforcement Guidance on Article 102 TFEU*, *supra* note 54, at para. 11. But it is also true that the other dimensions of consumer welfare may sometimes indeed be outright ignored by competition law decision-makers and commentators.

[61]*See* Eugene K. Kim, *Labor's Antitrust Problem: A Case for Worker Welfare*, 130 YALE L.J. 428, 442 n.65 (2020).

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gradually embraced the Commission's approach. Recently, the Court went all the way to describe EU competition law as fundamentally serving consumers. As mentioned above, in *Servizio Elettrico Nazionale*, the Court opined that "the well-being of . . . consumers must be regarded as constituting the ultimate objective justifying the intervention of competition law . . . ."[62] The Court followed the opinion of AG Rantos, which substantiated this objective by—beyond recounting the Court's own case law—observing that competition law provisions in the Treaty mention consumers as possible victims of violations[63] and allow negative effects of restricted competition to be counterbalanced by advantages that benefit consumers.[64] The opinion also noted that the "pre-eminence of 'consumer well-being' appears to be consistent with the Commission's decision-making practice, under which consumer protection is the *leitmotiv* of any intervention of Article 102 TFEU and of competition law more generally."[65] In addition, in *Superleague*[66] and *Google Shopping*,[67] the Court observed that Article 102 TFEU achieves its purpose by "sanctioning the conduct of undertakings in a dominant position that has the effect of hindering competition on the merits and is thus likely to cause direct harm to consumers, or which causes them harm indirectly by hindering or distorting that competition."[68] It thus seems beyond dispute that the Court places extraordinary emphasis on the well-being of consumers.

To be sure, EU competition law does pursue also other objectives than consumer well-being and many argue that it should do to an even larger extent. At least for now, nevertheless, the welfarist perspective as well as the focus on consumers appears well entrenched. The present Article then discusses strategies to overcome the consumerist focus in order to protect also workers.

II. Consumer, Total, and Worker Welfare

We have seen that EU competition law is ostensibly supposed to protect the welfare of consumers. Before Section C puts forward the arguments why EU competition law should nonetheless intervene also against harm to workers, it will be helpful to elaborate on the various notions of welfare and the relationships between these notions.

As a preliminary point, welfare in plain language refers to people's well-being or utility, that is, how good a life people are actually living.[69] It was already indicated above that competition economics uses the term in a narrower sense for economic surplus, that is the difference between gain and cost, which is supposed to represent the well-being.[70] For its tractability, this Article works with the economic welfare apparatus. The motivation is nevertheless to protect workers' true well-being.

[62]*Servizio Elettrico Nazionale*, Case C-377/20 at para. 46.

[63]Opinion of Advocate General Rantos, *supra* note 20, at para. 96.

[64]*Id.* at para. 98.

[65]*Id.* at para. 99 (citation omitted).

[66]ECJ, Case C-333/21, Eur. Superleague Co. v. Fédération Internationale de Football Ass'n, ECLI:EU:C:2023:1011 (Dec. 21, 2023), para. 124, https://curia.europa.eu/juris/liste.jsf?num=C-333/21.

[67]ECJ, Case C-48/22 P, Google & Alphabet v. Comm'n (Google Shopping), ECLI:EU:C:2024:726 (Sept. 10, 2024), para. 87, https://curia.europa.eu/juris/liste.jsf?num=C-48/22.

[68]*Google Shopping*, Case C-48/22 P at para. 87 (citing *Eur. Superleague Co.*, Case C-333/21 at para. 124). It is true that the purpose of Article 102 TFEU stated by the Court in the same paragraphs of both judgments is "to prevent competition from being restricted to the detriment of the public interest, individual undertakings and consumers," which appears broader than consumer welfare. Still, the quote in the main text suggests that these broader objectives are supposed to be achieved by rendering unlawful only conduct that—directly or indirectly—harms consumers.

[69]Kim, *supra* note 61, at 436; Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUAL. 190, 191 (2022).

[70]Jan Broulík, *Total/Consumer Welfare*, *in* ELGAR ENCYCLOPEDIA OF COMPETITION LAW (Johan van de Gronden, Catalin S. Rusu, Marc Veenbrink, Mariateresa Maggiolino & Sofia Oliveira Pais eds., forthcoming) (on file with author); Posner & Sunstein, *supra* note 69, at 192 ("[M]any economists believe (or assume) that welfare is correlated with wealth and income. The extent of the correlation is an empirical question.").

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1. Consumer and Total Welfare

Let us first turn to the relationship between consumer and total welfare. This discussion will allow us to identify arguments in favor of consumer welfare, which—as we will see later[71]— may be deployed also in support of worker welfare.

As mentioned, when buying a product from producers, consumers enjoy a surplus amounting to the difference between their valuation of the product and the price that they pay for it.[72] There is nevertheless also a surplus to be enjoyed by the producers: The difference between the price paid by consumers and the cost of producing the product. This "producer surplus" is also known as profit. The sum of consumer and producer surplus is called total surplus in general economics. In the context of competition law, the same concept is then usually referred to as total welfare.[73]

The effect of a restriction of competition on consumer welfare is not always the same as its effect on total welfare. Most of the time, a restriction that decreases consumer welfare will at the same time decrease total welfare.[74] But sometimes it won't because the decrease in consumer surplus will be offset by an even bigger increase in producer surplus.[75] This may happen for instance if a merger of two businesses leads to higher prices charged to consumers while lowering the costs of production, for example due to significant economies of scale. The choice between consumer and total welfare as objectives of competition law may thus have significant implications for which business conduct is in the end lawful and which is not.[76]

While competition laws of the European Union and of the United States—as well as of other many other jurisdictions[77]—prefer the pursuit of consumer welfare over total welfare, they are not very vocal about why. When one takes into account scholarship on the topic, it is nevertheless possible to identify two main advantages of consumer welfare.

First, consumer welfare focuses only on the effects of conduct on other actors than the businesses engaging in the conduct. If a competition law system pursued total welfare, it would not intervene against producer conduct that does harm consumers but that benefits producers themselves even more. In other words, total welfare "inclu[des] the welfare of the firm or firms causing the reduction in competition ...."[78] Consumer welfare, in contrast, "excludes from antitrust consideration the welfare of ... the firms engaging in the allegedly anticompetitive behavior ...."[79] It is namely possible to view the eventual increase of the firms' welfare at the expense of consumers as equivalent to stealing.[80] And "laws don't normally instruct the constable

[71] *See infra* notes 182–183, 196–197 and accompanying text.

[72] The link usually drawn by competition law between prices and consumption levels on the one hand and well-being on the other is not without controversy. For one, there are—so called "demerit"—goods, such as alcohol or cigarettes, where well-being may actually decline as more is consumed. *See, e.g.*, Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 152–53 (2011). While this is an important issue, it does not directly concern the question whether worker welfare ought to be relevant in EU competition law.

[73] *See, e.g.*, Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 472 (2012) (equating total surplus with total welfare). In the literature of competition law, there exists the same, or very nearly the same, concept, though with various names. *See* NAZZINI, *supra* note 38, at 32–33 ("social welfare"); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard – Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 336 (2010) ("aggregate economic welfare"); Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 66 (2019) ("general welfare").

[74] *E.g.*, Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2498 (2013), Hovenkamp, *supra* note 73, at 77.

[75] *E.g.*, Clayton J. Masterman, *The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law*, 69 VAND. L. REV. 1387, 1399 (2016).

[76] Blair & Sokol, *supra* note 74, at 2498.

[77] *See id.* at 2502 ("[I]t seems to be consumer welfare that is the standard on which there is increasing international convergence.").

[78] Hemphill & Rose, *supra* note 23, at 2092.

[79] Posner & Sunstein, *supra* note 69, at 195.

[80] *See* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 200–01 (2008). *See generally* Kirkwood, *supra* note 33. *Cf.* Matthew Dimick, *Conflict of*

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to release wrongdoers if their gains are greater than their victims' losses."[81] Lande then reframes the same idea in terms of property rights: Consumers in his view have a "property right ... to purchase competitively priced goods,"[82] which is why any eventual benefits to producers from charging supra-competitive prices are irrelevant.

Second, consumer welfare is arguably superior to total welfare in terms of distributive outcomes.[83] Consumers, the argument goes, are on average poorer than producers, represented by their shareholders and top managers.[84] Promotion of consumer welfare is therefore supposed to lead to a more equal society,[85] albeit at the cost of the overall pie not being as large as it could. This closely relates to the point that it is easier to muster political support for consumer welfare due to the popularity of ideas that it engenders.[86] While some have disparaged this development as "populism,"[87] others applaud that the choice of the objective reflects the will of the people. In either case, there are distributive reasons to pursue consumer rather than total welfare as the objective of competition law.[88]

Consumer welfare is also sometimes said to be preferred over total welfare for concerns related to the ease of administration on the part of competition-law decision-makers. This justification appears rather weak. As observed for instance by Nazzini, administrability alone is hardly a sufficient justification for any objective of competition law.[89] To be sure, a more logical argument is sometimes being made that the actual deeper objective of competition law is total welfare and that the law in practice works with consumer welfare as "only" a better administrable proxy. Enforcers of competition rules thus under this perspective pursue consumer welfare because doing so is believed to enhance total welfare better than pursuing the latter directly. Even this argument, nevertheless, "seems ... a post hoc rationalization ... rather than an adequate defense."[90] As indicated above, there is very little in EU competition law to suggest that its deeper objective is total welfare. That is why this possibility will not be further entertained below. The underlying idea that the law may protect the welfare of a certain group of market players as a proxy for another group[91] will nevertheless prove useful for the following debate about the relationship between consumer welfare and worker welfare.

Laws? Tensions Between Antitrust and Labor Law, 90 U. CHI. L. REV. 379, 394 (2023) ("[T]he consumer welfare standard is an injunction against illicit transfers of wealth. The concern is ... something more like theft.").

[81]Eric A. Posner, *What Is the Role of Economics in Merger Review?*, PROMARKET (Mar. 28, 2024) https://www.promarket.org/2024/03/28/what-is-the-role-of-economics-in-merger-review/.

[82]Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 632 (1989).

[83]JONES ET AL., *supra* note 36, at 47. For the U.S. context, see, for example, Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 16 (2015).

[84]*See* Baker & Salop, *supra* note 83, at 17; Posner & Sunstein, *supra* note 69, at 196.

[85]Please note that this argument only makes sense insofar as the pursuit of consumer welfare benefits *final* consumers. As we will see below, it is not necessarily so.

[86]*See generally* Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483 (2006).

[87]NAZZINI, *supra* note 38, at 45.

[88]Some recast this distributive argument in terms that reflect on the fact that economic surplus is not a perfect proxy for well-being. Namely, while surplus does not decrease on the margin, well-being, or utility, does. That is to say that paying one hundred extra euros for a product by a poor family and by a billionaire will have the same impact on their economic surplus, but will harm the well-being of the family more than the well-being of the billionaire. Insofar as it is for whatever reason not possible to directly pursue actual well-being in society, consumer welfare may therefore be preferred as the objective of competition law because it arguably leads to more such well-being than total welfare. *See* Posner & Sunstein, *supra* note 69, at 196; Luke Taylor, *Antitrust Remedies for Union Busting*, 44 BERKELEY J. EMP. & LAB. L. 1, 38–39 (2022).

[89]NAZZINI, *supra* note 38, at 44. Nazzini explains:

> The reality is that this argument addresses the question from the wrong end. What is required is to identify the appropriate objective of competition law and then, based on such an objective, design administrable legal tests. It is absurd to identify an administrable enforcement test first and then elevate it to the objective of competition law.

Id.

[90]Posner & Sunstein, *supra* note 69, at 203.

[91]Here the former group consists of consumers alone and the latter of both consumers and producers.

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2. Consumer and Worker Welfare

The present section addresses the relationship between the welfare of workers and consumers. But before delving into this relationship as such, let us have a quick look at how welfare is divided in labor markets. The economic model described in the previous section considers the interaction between producers and consumers, that is, what happens in product markets. It is possible to conceptualize similarly the relationship between employers and workers. One obvious difference is that businesses this time act as buyers and individual people as sellers, which is the reverse of product markets. The welfare of workers then corresponds with the difference between their actual wage and the lowest wage that they would still accept to keep working for the employer.[92] In contrast, employer welfare is the difference between the workers' contribution to the revenues of employers and the wages paid by employers to workers.[93] As explained above, this Article focuses on wage as a shorthand for also other dimensions of worker welfare.[94] These include for instance benefits, hours, working conditions, and training.[95]

When it comes to the relationship between consumer and worker welfare, it is somewhat more complicated than the relationship between producer and consumer welfare or between worker and employer welfare. This is because consumers and workers are not directly interacting with each other or, in other words, they are not active on the same market. There nevertheless is a connection between them through the supply chain. In the most simple scenario, consumers and workers are just one link—or layer—of the chain apart: Workers sell their labor to businesses and the same businesses sell their products to consumers. Workers and consumers thus find themselves on different sides of those businesses.[96]

The effects that competitive harm to workers—or, in fact, to any supplier—has on consumers may vary. Sometimes, worker harm will, ultimately, also bring about consumer harm.[97] There are two conditions for such a result.[98] First, the business is able to pay less for a unit of labor—that is, to suppress the wage rate—by reducing the amount of labor that it procures.[99] The lower amount of labor employed will lead to fewer units of output being produced by the business for the downstream product market. The business will not mind this lower output as long as the lost profit from the units not produced is outweighed by the greater profit margin that the suppressed wage makes possible on the units still produced. Second, other producers do not offset this resulting lower output.[100] There will thus be fewer units available to consumers, likely for a higher unit price.[101] It may then make sense to intervene against such a restriction of competition between employers even if competition law actually cares only about the welfare of consumers.

[92]Masterman, *supra* note 75, at 1400.

[93]*Id.* This employer surplus is part of producer surplus on the product market. *See id.* at 1401 n.80. In a competitive labor market, the actual, or equilibrium, wage corresponds with the revenue generated by one more unit of labor being employed, so-called marginal revenue product. *See* Marinescu & Hovenkamp, *supra* note 6, at 1041; Posner, *supra* note 6, at 20. *See also supra* note 9 and accompanying text.

[94]*Supra* note 61 and accompanying text.

[95]*See* Jan Broulík, *Relevant Labour Market: Missing in the New Market Definition Notice*, J. Antitrust Enf'T 1, 10 (2025) (advance article; pagination subject to change); Kim, *supra* note 61, at 441–44.

[96]Sometimes a person may purchase products from the business for which she also works. This does not play any role for our purposes here.

[97]Marinescu & Hovenkamp, *supra* note 6, at 1062; Naidu et al., *supra* note 5, at 559. *Cf.* May & Lee, *supra* note 25, at 11.

[98]Alexander & Salop, *supra* note 9, at 281.

[99]Whether the employer is able to decrease the wage below the competitive level by procuring fewer units of labor than in the competitive equilibrium depends on whether the supply of labor is at least somewhat "inelastic" at the competitive wage rate. *See* Alexander & Salop, *supra* note 9, at 281. This is, in turn, codetermined by how much competition there is between employers.

[100]This is to say that there isn't sufficient competition on the downstream market.

[101]*See, e.g.*, Hemphill & Rose, *supra* note 23, at 2087.

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Nevertheless, crucially to our purposes, under other market conditions, wage suppression may have no effect on consumers on the downstream product market or even benefit them.[102] If there is fierce competition on the product market, other businesses will offset any output restrictions and the given business will thus need to sell for the low competitive price regardless of its actions against workers.[103] The underlying assumption that the business has power on the labor market but not on the product one is not a far-fetched one. It is possible that the businesses are located far apart and thus do not compete for workers, but at the same time deliver competing products to buyers in a greater, overlapping geographic area.[104] Marinescu and Posner give the example of mines: Mining businesses are often the only significant employers in the given local area but sell their products far away.[105] It may also be that the output-market rivals employ different production technology and, thus, each need a different type of personnel.[106]

What is more, if the employer manages to achieve a lower price per unit of work without an effect on the number of units purchased,[107] it may actually have the incentive to decrease its prices and even increase its output down the stream,[108] which benefits consumers. This is recognized by one of the European Commission guidelines: "If increased buyer power lowers input costs without restricting ... total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices."[109] Under the traditional market power theory, such a lowering of hourly wage without a decrease of labor purchased is possible when the supply of labor is inelastic, that is, when the amount of labor offered by workers to employers does not respond to changes in the wage rate,[110] which may be for instance due to the workers having made sunk investments in their qualifications.[111]

Alternatively to this traditional buyer power, employers may also have "bargaining leverage." The traditional power stems from the ability of the buyer to set the price for the whole market, which leads to fewer units actually being sold than in a competitive market.[112] In contrast, bargaining leverage occurs between a particular buyer and a particular seller where the former "merely" *threatens* to reduce purchases from the seller.[113] The lower price is thus achieved by the threat alone, not by an actual decrease in the volume traded.[114] Employers wielding this power against workers thus have no reason to limit the downstream output and may even be motivated to produce more. Alexander and Salop give the example of a merger between two promoters of figure skating performances.[115] The skaters' bargaining leverage will decline because they cannot anymore "play off the offers of the two promoters against each other."[116] As a result, the merged

[102]*See id.* at 2088; Masterman, *supra* note 75, at 1402. *Cf.* Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1551 (2013) ("[M]onopsonies, while harming sellers, do not always harm consumers.").

[103]*See* Alexander & Salop, *supra* note 9, at 282; Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381, 391 (2020). *Cf.* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 711 (2007) (discussing this possibility with regard to any sellers, not just workers).

[104]MAY & LEE, *supra* note 25, at 11; Broulík, *supra* note 94, at 14.

[105]Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1359 (2020).

[106]Broulík, *supra* note 94, at 14. *Cf.* COMPETITION COMM., ORG. FOR ECON. CO-OPERATION & DEV., MONOPSONY AND BUYER POWER 246 (2009) [hereinafter MONOPSONY AND BUYER POWER].

[107]*See* Lauren Sillman, *Antitrust for Consumers* and Workers*: A Framework for Labor Market Analysis in Merger Review*, 30 KAN. J.L. & PUB. POL'Y 37, 49 (2020).

[108]Alexander & Salop, *supra* note 9, at 283–84.

[109]*EU Horizontal Merger Guidelines*, *supra* note 56, at para. 62.

[110]*See* Stucke, *supra* note 102, at 1518 (explaining this theory).

[111]Alexander & Salop, *supra* note 9, at 282.

[112]Unless supply is perfectly inelastic as discussed in the preceding paragraph.

[113]Hemphill & Rose, *supra* note 23, at 2099–2104.

[114]Ezrachi & Ioannidou, *supra* note 13, at 71; MAY & LEE, *supra* note 25, at 13.

[115]Alexander & Salop, *supra* note 9, at 283–84.

[116]*Id.* at 284.

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promoter will be able to pay less to the skaters and, therefore, may charge less for tickets and increase the number of performances.

As mentioned, the present Article focuses on the competition-law relevance of worker harm as such. Whether the law recognizes this type of harm as a self-standing reason warranting intervention is essential in cases in which workers are harmed but consumers are not.[117] If harm to workers does not constitute such a reason in its own right, the respective conduct of employers is in principle lawful. In contrast, if the harm is indeed intrinsically relevant, the conduct is in principle unlawful. In Section C, this Article offers arguments supporting the latter option.

3. Welfare, Enforcement, and Rule-Making

Before proceeding to the arguments in favor of recognizing worker harm as relevant in itself, it ought to be emphasized that the recognition of any welfare objective by a competition law system does not necessarily mean that the objective needs to be considered as (part of) the test of lawfulness in individual cases.[118] To be sure, some advocates of welfarist competition law see no other option than such a case-by-case implementation.[119] It is nevertheless possible to take the welfare effects of business conduct into account when fashioning competition rules but, ultimately, design rules that will not test lawfulness against such effects.[120] This may be for instance because of second-order administrability-related concerns such as costliness or predictability of enforcement.[121]

The relevance of worker harm to EU competition law argued for by the present Article is to be understood in this way: The law need not necessarily consider worker harm on a case by case basis; it is enough if the welfare of workers is taken into consideration in the design and interpretation of competition rules.

C. Intrinsic Relevance of Worker Harm

It is possible to employ two distinct lines of argument as to why harm to workers should be intrinsically relevant to EU competition-law decision-making about whether restrictions of competition between employers violate the law, even if there is no harm to consumers. First, one may argue that the law protects all market counterparties, including workers.[122] Second, it is

[117] *Cf.* May & Lee, *supra* note 25, at 12.

[118] Fednando Castillo de la Torre, *Is the Effects-Based Approach Too Cumbersome?: Taking Stock of Recent Practice and Case Law on Article 102 TFEU*, *in* The Transformation of EU Competition Law 81 n.76, 145, 146 (Adina Claici, Assimakis Komninos & Denis Waelbroeck eds., 2023).

[119] Tim Wu, *The Consumer Welfare Standard Is Too Tainted*, ProMarket (Apr. 19, 2023), https://www.promarket.org/2023/04/19/the-consumer-welfare-standard-is-too-tainted/.

[120] *See* Elhauge, *supra* note 25; Nazzini, *supra* note 38, at 48–49 ("[T]he optimal test to be applied by the decision-maker does not need to be the same as the ultimate objective of the law ...."); Nicolas Petit & Lazar Radic, *Four Misconceptions About the Consumer Welfare Standard*, ProMarket (Oct. 25, 2023), https://www.promarket.org/2023/10/25/four-misconceptions-about-the-consumer-welfare-standard/ ("A soft version of the standard does not make consumer welfare a test of legality in the particular case, but rather a 'guide' in the formulation of legal rules of liability and procedure."). Eric Posner discusses this idea:

> No other enforcement agency I am aware of considers itself bound to do consumer welfare-style or other cost-benefit analysis on a case-by-case basis when it enforces the law. Not the Securities and Exchange Commission, the Commodity Futures Trading Commission, nor the Federal Deposit Insurance Corporation when it shuts down a bank. Not the U.S. Attorney's Office in New York when it investigates an insider-trading allegation. Many federal agencies, like the Environmental Protection Agency, for example, conduct cost-benefit analyses when they issue regulations; but not when they enforce them.

Eric A. Posner, *The Role of Consumer Welfare in Merger Enforcement*, ProMarket (Sept. 7, 2023), https://www.promarket.org/2023/09/07/eric-posner-the-role-of-consumer-welfare-in-merger-enforcement/.

[121] *See generally* Jan Broulík, *Predictability: A Mistreated Virtue of Competition Law*, 12 J. Antitrust Enf't 362 (2024).

[122] *See infra* Section C.I.

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possible to maintain that the law intervenes against anti-competitive conduct that harms non-entrepreneurial individuals at the edges of supply chains, that is, final consumers and workers.[123] These two lines of argument are not entirely conceptually compatible: They constitute alternative approaches, each starting from a different understanding of consumerist competition law. Both lines of argument nonetheless draw primarily on EU competition law as it has been interpreted by the EU Courts, the European Commission, and the scholarship. In part, they also suggest to reinterpret the law in line with U.S. antitrust, including American academic writings, as the birthplace of the consumer-welfare paradigm. Nevertheless, neither of the arguments challenges the welfarist nature of competition law: The law is assumed to exist in order to protect the well-being of certain market players.[124]

I. The Law Protects All Market Counterparties

An argument why EU competition law should protect worker welfare as such, and thus intervene against restrictions of competition between employers that harm workers, can be based on the fact that the law frequently renders as unlawful conduct in markets where the counterparty is not final consumers. As discussed above, EU competition law ostensibly embraces the consumer welfare paradigm. Yet, as we are about to see, the law actually intervenes even in cases where the market counterparties are non-consumer buyers or sellers. This section will argue that there are compelling reasons for harm to any counterparty to warrant intervention in itself.

1. Any Buyer or Seller as the Market Counterparty

EU competition law intervenes in cases with various types of actors finding themselves on the other side of the market in which competition is restricted. At first blush, one might think that competition law protecting consumer welfare focuses only on business conduct on markets where the buyers are people who consume products for personal needs. After all, this is how the word consumer is understood in economic theory, which has been underlying competition-law thinking in the several last decades.[125] In fact, the economic model used to explain consumer welfare, as it was presented above, is usually framed in terms of final consumers, too. And even a large part of the EU legal order understands consumers in this way.[126] Conversely, actors who use products in relation to their business activity are generally not perceived as consumers. One might therefore expect "consumerist" EU competition law not to apply to conduct towards such business actors.

Upon a closer look, nevertheless, EU competition law does clearly apply also to the conduct of businesses on markets with other counterparties. This includes markets where the counterparty is business customers. In other words, competition rules are being enforced for instance against the fixing of prices of products that are purchased by other businesses or against mergers of companies that supply other companies. This has significant implications for the real-world scope of the law because most markets in the economy have business customers—rather than final consumers—on their buying side.[127]

As a matter of fact, EU competition law does even terminologically count business buyers among consumers. In other words, the law does not embrace the literal meaning of the word consumer. Instead, the word has been used in a broader sense, when referring to anyone purchasing products, that is, even to those who do so not for personal but business use.

[123] *See infra* Section C.II.

[124] *See supra* note 29 and accompanying text.

[125] *See, e.g.*, Daskalova, *supra* note 34, at 139.

[126] For instance, most EU directives define the consumer as a "natural person who is acting for the purposes which are outside his trade, business and profession ...." JANA VALANT, EUR. PARL. RSCH. SERV., CONSUMER PROTECTION IN THE EU: POLICY OVERVIEW 4 (2015).

[127] Akman, *supra* note 50, at 318; Daskalova, *supra* note 34, at 140.

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There are numerous examples of EU competition law embracing this broad interpretation. Consider for instance the Court of Justice's reference to "intermediary and final consumers" in *Servizio Elettrico Nazionale*.[128] Similarly, the Merger Control Regulation talks about "intermediate and ultimate consumers."[129] A comprehensive account of the scope of the concept is then provided by the Commission guidelines on the application of Article 101(3) TFEU:

> The concept of "*consumers*" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers ... are the customers of the parties to the agreement and subsequent purchasers. These customers can be undertakings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.[130]

Other Commission documents conveying a similar message include for instance the enforcement guidance on Article 102 TFEU,[131] the draft guidelines on Article 102 TFEU,[132] or the horizontal merger guidelines.[133]

What is more, EU competition law is being applied even to the conduct of businesses on the buying side of a market,[134] that is, facing the sellers as their counterparty. For instance, Article 101(1)(a) TFEU talks about the fixing of not only selling prices but also purchasing prices.[135] As regards the Court of Justice, it held in *T-Mobile* that coordination among Dutch telecom operators on "the remuneration which those operators intend to pay for the services supplied to them"—that is, on their actions as buyers—could violate Article 101 TFEU.[136] Similarly, the Commission guidelines on horizontal cooperation discuss how Article 101 TFEU may be infringed by joint purchasing arrangements aiming to create a degree of buying power vis-à-vis suppliers.[137] And the Commission horizontal merger guidelines talk about the negative effects of increased buyer power of the merged entity.[138]

The market counterparties do not need to be the direct targets of the conduct at stake, that is, be exploited.[139] To be sure, they may be targeted in such an immediate way: The conduct may itself entail a worsening of trading conditions for final consumers, business buyers or sellers on the other side of the market. Nevertheless, the conduct may instead be exclusionary, which is to say that its immediate target is business(es) on the same side of the market as the business engaging in

[128] *Servizio Elettrico Nazionale*, Case C-377/20 at para. 46.

[129] Council Regulation 139/2004, art. 2(b)(1), 2004 O.J. (L 24) 1, 7 (EC).

[130] *Guidelines on Article 101(3) TFEU*, *supra* note 52, at para. 84 (emphasis added).

[131] *Enforcement Guidance on Article 102 TFEU*, *supra* note 54, at para. 19 n.2.

[132] *Draft Guidelines on Article 102 TFEU*, *supra* note 55, at para. 1 n.2.

[133] *EU Horizontal Merger Guidelines*, *supra* note 56, at para. 79, n.105.

[134] In fact, sometimes it even may not be possible to distinguish between the two sides. Daskalova, *supra* note 34, at 141; Orbach, *supra* note 72, at 139. Take, for instance, barter transactions, that is, transactions in which both parties supply products as part of the exchange instead of one of them providing money.

[135] Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1)(a), May 9, 2008, 2008 O.J. (C 115) 88 (prohibiting agreements that "directly or indirectly fix purchase or selling price or any other trading conditions").

[136] ECJ, Case C-8/08, T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, ECLI:EU:C:2009:343 (June 4, 2009), para. 19, https://curia.europa.eu/juris/liste.jsf?num=C-8/08.

[137] *See Guidelines on Horizontal Cooperation*, *supra* note 53, at paras. 273–316.

[138] *See EU Horizontal Merger Guidelines*, *supra* note 56, at para. 61.

[139] *See supra* note 57 and accompanying text.

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the conduct. Even interventions against exclusionary conduct protect market counterparties insofar as such conduct facilitates their exploitation.[140]

2. Derivative and Intrinsic Relevance of Counterparty Harm

The previous section showed that EU competition law regularly intervenes against business conduct even where the market counterparty is not final consumers but business buyers or sellers. It is a separate question *why* the law intervenes in these cases. One possibility is that such interventions actually aspire to protect final consumers, who may also ultimately get harmed by such conduct. This section entertains this possibility first. Alternatively, the interventions may be motivated by a desire to protect the other counterparties themselves.[141] This latter possibility is discussed subsequently and is essential for the argument made by this Article that the law should treat harm to workers as relevant intrinsically. Arguments in favor of this possibility will be put forward by the following section.

It is true that competition law could intervene against harm to business buyers or to sellers "only" because such harm further translates into harm to final consumers down the stream.[142] This motivation would be hardly disputable if the law actually directly associated unlawfulness of business conduct towards business buyers or towards sellers with harm to final consumers. Yet, in reality, the enforcers of EU competition law often neglect harm to final consumers, focusing instead only on harm to the market counterparties.[143] Nevertheless, one may see such interventions as animated by the welfare of final consumers even then: Harm to market counterparties can be seen as only a proxy for harm to final consumers. In other words, the translation of competitive harm suffered by market counterparties into final-consumer harm is then presumed rather than actually verified case by case. As noted by Stucke, proving harm to final consumers from selling conduct that takes place up the stream, especially as regards intermediary goods, is often difficult.[144] Harm to business buyers could then be potentially treated as a proxy for harm to final consumers. For instance, the Commission Discussion Paper on Article 102 observed that EU competition law intervenes against harm to intermediate buyers because this harm "is generally presumed to create harm to final consumers ...."[145]

The same presumption could also be applied with regard to the conduct of buyers, that is, situations whether the market counterparty is sellers.[146] Stucke observes that proving that final

[140]*See supra* note 58 and accompanying text. *See also* Daniel Zimmer, *The Basic Goal of Competition Law: To Protect the Opposite Side of the Market*, *in* THE GOALS OF COMPETITION LAW 486, 499 (2011) ("Competitors of cartel members, merging firms or dominant undertakings enjoy protection under competition only insofar as this serves the interests of the opposite side of the market.").

[141]*See* Daniel A. Crane, *Rationales for Antitrust: Economics and Other Bases*, *in* 1 OXFORD HANDBOOK OF ANTITRUST ECONOMICS 3, 12 (Roger D. Blair & D. Daniel Sokol eds., 2015) (discussing these two possible rationales for intervening against buyer power).

[142]*See, e.g.*, Franck, *supra* note 40, at 850 ("As competition law is, first and foremost, concerned with the protection of consumer welfare, the focus is on theories of harm, which are indifferent to how the gains from trade are divided between various businesses along the supply chain.").

[143]*See* Daskalova, *supra* note 34, at 147.

[144]*See* Stucke, *supra* note 102, at 1549.

[145]European Commission, Directorate General for Competition, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, at para. 55 (2005). *But see* Akman, *supra* note 50, at 319 (pointing out that this presumption is often invalid).

[146]*See* Hemphill & Rose, *supra* note 23, at 2092 (arguing that mergers harming sellers should be prohibited even if the law actually pursues consumer welfare and if some mergers harming sellers may not harm consumers because the overlap is sufficiently common and "a fine-grained search for case-specific exceptions carries an unacceptable risk of false negatives"); Taylor, *supra* note 88, at 30 ("Scholars applying the consumer welfare standard have advocated antitrust rules that, without requiring any proof of consumer harm, hold buyers liable for monopsony conduct that possibly could help consumers, so long as it is sufficiently likely that the conduct instead harms consumers."); Werden, *supra* note 103, at 719 ("Application of the per se rule to buyer cartels might be defended on grounds of simplicity even if the Sherman Act were indifferent to the plight of

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consumers are harmed by the conduct of buyers is even more difficult than in the case of conduct of upstream sellers.[147] Consider in this context for instance the Court's observation in *T-Mobile* that there doesn't need to be "a *direct* effect on the prices paid by end users"[148] for a violation of Article 101 TFEU—by buyers—to occur. This formulation suggests that some—albeit possibly only indirect—effect on final consumers is actually required. A similar formulation appeared in the Commission's decision in the merger case *Aurubis Metallo*, where the Commission observed that "the Merger Regulation and the Horizontal Merger Guidelines do not preclude the Commission from intervening in buyer power cases where *direct* harm to consumers cannot be demonstrated."[149]

The fact that seller harm carries no intrinsic relevance is suggested also by some documents of the European Commission. For instance, the part of the horizontal cooperation guidelines dealing with joint purchasing seems to care only about its the negative competitive effects on downstream customers:[150]

> If the members of the joint purchasing arrangement have a significant degree of buying power on the purchasing market, there is a risk that the arrangement may harm competition upstream, which may ultimately also cause harm to consumers downstream. For example, the exercise of joint buying power may harm suppliers' investment incentives and force suppliers that do not have countervailing seller power to reduce the range or quality of products that they produce. This may lead to restrictive effects on competition in the upstream market, such as quality reductions, lessening of innovation efforts and ultimately sub-optimal supply. Moreover, retailers may exercise buying power and play off suppliers against each other by jointly limiting product variety in their shops, ultimately harming consumers downstream.[151]

The guidelines have nothing to say about harm suffered by sellers themselves. Consequently, "a finding of infringement … seems almost conditional on the existence of … effects on downstream markets."[152]

The Commission took this position also in its contribution to a 2008 OECD competition-policy roundtable on monopsony and buyer power.[153] The contribution maintained that "competition between purchasers on the procurement side is [not] to be protected to the same extent as competition between suppliers on the sales side."[154] This is because the "European Commission policy is that the ultimate end user of any product—the consumer—should be at the centre of competition law."[155] The law should thus intervene only against buyer conduct that "has an effect on competition on the sales market ...."[156]

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exploited sellers."); *id.* at 730 ("[T]o trace the incidence of effects all the way down the distribution chain … would impose an additional burden on plaintiffs and the courts ....").

[147]Stucke, *supra* note 102, at 1549.

[148]*T-Mobile Netherlands BV*, Case C-8/08 at para. 36 (emphasis added).

[149]Comm'n Decision of May 4, 2020, Declaring a Concentration to be Compatible with the Internal Market and the Functioning of the EEA Agreement, Case M.9409, Aurubis/Metallo Group Holding, para. 376 (May 4, 2020) (emphasis added).

[150]*See* Victoria Daskalova, *The Monopsony Paradox: Buyer Power and Enforcement of the EU Antitrust Provisions* 194 (May 30, 2016) (Ph.D. dissertation, Tilburg University) (on file with author) (discussing the previous—but largely similar—horizonal cooperation guidelines, Commission Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C 11) 1).

[151]*Guidelines on Horizontal Cooperation*, *supra* note 53, at para. 294.

[152]Daskalova, *supra* note 150, at 196.

[153]Monopsony and Buyer Power, *supra* note 106, at 255–60.

[154]*Id.* at 255.

[155]*Id.* at 255.

[156]*Id.* at 256.

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Nevertheless, crucially to out purposes here, it is also possible to see harm to other market counterparties than final consumers as relevant in itself. For instance, the repeatedly mentioned judgment of the Court of Justice in *Servizio Elettrico Nazionale* states that the "ultimate objective" of EU competition law is "the well-being of both intermediary and final consumers."[157] This formulation suggests that harm to intermediary consumers, that is, business buyers, matters in its own right, not only because it further leads to harm to final consumers.

Also as regards seller harm, it is possible to argue that it is undesirable intrinsically.[158] For instance, the Opinion of Advocate General Jacobs in *AOK Bundesverband* does focus on how restrictions of competition between buyers can have "negative consequences for the supply side of the relevant market."[159] And the EU Commissioner for Competition has recently noted that buyer cartels that do not raise price for consumers are not a "victimless crime" because "they still have direct victims—even if it's suppliers, not consumers, who suffer."[160]

Further, the Commission staff have recently observed that certain buyer conduct may violate competition rules even if consumers benefit from the conduct.[161] The respective contribution focused on the question whether eventual benefits to consumers play a role in the assessment of buyer conduct's lawfulness.[162] As such, it did not directly address the question whether seller harm is relevant intrinsically. The conclusion that consumer benefits that "arise from the mere exercise of marker power [towards sellers] cannot be taken into account"[163] and, thus, cannot render the conduct lawful, nevertheless, strongly suggests that seller harm matters in itself.

EU competition law's approach to cases where the harmed market counterparty is not final consumers can be helpfully looked at through the prism of U.S. antitrust law, as the birthplace of the consumer welfare objective. First of all, U.S. antitrust law, like EU competition law, perceives business buyers as consumers. Next, while cases concerning harm to sellers have admittedly also been relatively rare in the United States,[164] more and more commentators believe that "the antitrust laws condemn anticompetitive conduct that harms any trading partner, not just consumers."[165] The law then considers as intrinsically relevant the welfare of anyone who sells to or buys from the businesses that restrict competition,[166] regardless of the restriction's effects on final consumers.[167]

[157]*Servizio Elettrico Nazionale*, Case C-377/20 at para. 46.

[158]*See* Daskalova, *supra* note 34, at 158 ("Harm to … sellers is also considered important for the purposes of EU competition law, regardless of the final effect on consumers.").

[159]Opinion of Advocate General Jacobs at para. 70, Joined Cases C-264/01, C-306/01, C-345-01 and C-355/01, AOK Bundesverband v. Ichthyol-Gesellschaft Cordes, Hermani & Co. (May 22, 2003).

[160]Vestager, *supra* note 17.

[161]Alessio Aresu, Dominik Erharter & Brigitta Renner-Loquenz, *Antitrust in Labour Markets*, Eur. Comm'n Competition Pol'y Brief, May 2024, at 7.

[162]*See infra* 237–241.

[163]Aresu et al., *supra* note 161, at 7.

[164]Hovenkamp, *supra* note 73, at 79.

[165]A. Douglas Melamed & Steven C. Salop, *An Antitrust Exemption for Workers: And Why Worker Bargaining Power Benefits Consumers, Too*, 85 ANTITRUST L.J. 739, 766 n.101 (2024). *See also* BAKER, *supra* note 27, at 179; Hovenkamp, *supra* note 6, at 516 (observing that U.S. antitrust rules "apply equally to sellers and purchasers, including purchasers of labor").

[166]*See* Hovenkamp, *supra* note 6, at 526 (noting that "under most antitrust laws buyer and seller harms are covered equally"); Posner & Sunstein, *supra* note 69, at 195. It is true that the approach has also been instead interpreted as a means to ultimately protect the welfare of final consumers. *See* Sillman, *supra* note 107, at 64–66.

[167]BAKER, *supra* note 27, at 178 ("When a reduction in competition harms suppliers—firms upstream from the defendants—the conduct can violate the antitrust laws regardless of whether the reduction in competition also harms buyers downstream from the defendants."); Hemphill & Rose, *supra* note 23, at 2087; Werden, *supra* note 103, at 735 ("It is enough that the conspiracy threatens the welfare of trading partners exploited by the conspiracy."). *But see* Crane, *supra* note 141, at 12 ("The question of antitrust policy is whether a plaintiff complaining about buyer-side market power should have to prove harm to consumer welfare, or whether merely proving anticompetitive harm to sellers is sufficient."). Crane continues: "Although some recent US Supreme Court cases could be read as requiring a showing of threats to consumer welfare even in monopsonization cases, this issue remains largely unresolved as a matter of positive law." *Id.* (internal citation omitted).

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This approach has been evidenced by case law[168] as well as soft law of the federal enforcement agencies[169] and argued to be a logical implication of the symmetric treatment of market power on the selling and buying side of the market.[170] Some authors have been calling the objective of this approach the protection or "counterparty welfare"[171] or "trading partner welfare."[172]

Please note that this interpretation of competition rules does not amount to an embrace of the total-welfare objective discussed above.[173] If competition law did pursue total welfare, it would take into account also the surplus of the very businesses that restrict competition[174] —and of their competitors.[175] But that does not happen when the objective is counterparty welfare:[176] Only the welfare of actors on the other side of the market matters.

Some U.S. commentators, such as Shapiro[177] or Posner and Sunstein,[178] even argue that it is not necessary to replace the notion of consumer welfare with that of counterparty or trading partner welfare. In a world where most cases have up to now concerned reduced competition between sellers and, thus, harm to—intermediate or final—consumers, it is only natural that enforcers and commentators have been using terminology reflecting only this category of cases.[179] Perhaps we can keep referring to "consumers" even now, the argument goes, when we are becoming more aware of the category of cases concerning competition between buyers. The word "consumer" is then to be used as a term of art, encompassing not only intermediate and final buyers but also sellers.[180]

3. In Favor of Intrinsic Relevance

The preceding section showed that, conceptually speaking, EU competition law may be intervening against business conduct harming business buyers or sellers as the market counterparties either because such conduct ultimately harms also final consumers or because the law assigns intrinsic relevance to the welfare of the buyers and sellers. This section offers arguments in favor of the latter position, that is, for EU competition law to protect market

[168] *See, e.g.*, Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007); Telecor Commc'ns v. Sw. Bell, 305 F.3d 1124 (10th Cir. 2002); Law v. National Collegiate Athletic Association, 134 F.3d 1010 (10th Cir. 1998). *See also* Sillman, *supra* note 107, at 57; Stucke, *supra* note 102, at 1544–45.

[169] *See* U.S. Dep't Just. & Fed. Trade Comm'n, Merger Guidelines § 2.10 (2023) ("If the merger may substantially lessen competition or tend to create a monopoly in upstream markets, that loss of competition is not offset by purported benefits in a separate downstream product market."); U.S. Dep't Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines § 12 (2010) ("[T]he Agencies [do not] evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.").

[170] *See* Hemphill & Rose, *supra* note 23, at 2080.

[171] Alexander & Salop, *supra* note 9, at 293.

[172] Hemphill & Rose, *supra* note 23, at 2080.

[173] *See* Zimmer, *supra* note 140, at 497.

[174] *See* Hemphill & Rose, *supra* note 23, at 2091; Posner & Sunstein, *supra* note 69, at 195.

[175] *See* Salop, *supra* note 73, at 337–38.

[176] Posner & Sunstein, *supra* note 69, at 195. *Cf.* Masterman, *supra* note 75, at 1399 ("Under the consumer welfare standard, however, a restraint would have a net anticompetitive effect if it decreases consumer welfare, regardless of the effect on producers."); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 687–88 (2005) (noting that total welfare renders the welfare of competitors relevant whereas consumer welfare does not); Salop, *supra* note 73, at 337–38 ("The true consumer welfare standard is indifferent to conduct that harms competitors—*unless* the conduct also likely harms consumers.").

[177] Carl Shapiro, Professor, Univ. Cal. at Berkeley, Address to the Senate Judiciary Committee, Subcommittee on Antitrust, Consumer Protection and Consumer Rights: The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt? (Dec. 13, 2017).

[178] Posner & Sunstein, *supra* note 69, at 195.

[179] Hemphill & Rose, *supra* note 23, at 2091.

[180] Hovenkamp, *supra* note 73, at 79; Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, ProMarket (Apr. 10, 2023), https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model/.

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counterparties themselves. It thus argues in favor of treating as intrinsically relevant competitive harm suffered by any counterparty,[181] including workers.

To start with, one may see competitive harm to any market counterparty as intrinsically undesirable for the same reason for which some prefer consumer welfare over total welfare. Namely, as discussed above, when competition is restricted by businesses who face final consumers, only the welfare effects on the consumers count because taking into account the effects on the businesses would be like considering relevant the positive effects of a robbery on the robber.[182] There is then no reason to treat differently situations in which businesses that restrict competition are not facing final consumers but other counterparties, including workers.[183] Even then only the effect on the counterparty should matter.

It is a question whether assigning intrinsic relevance to any competitive harm inflected by businesses requires relinquishing of consumer welfare as the—primary—objective of EU competition law. As discussed, all counterparties may actually be in a certain sense seen as consumers. Namely, it is possible that the law has been referring to—both ultimate and intermediate—purchasers as its beneficiaries only because cases concerning restrictions on the buying side of markets have been rarely pursued. Perhaps now we can keep using the word "consumer" —albeit somewhat metaphorically[184]—for any market counterparty that gets harmed by anti-competitive conduct, even if that party finds itself on the selling side of the market, including workers. After all, the law has been already for some time using the word even for business buyers despite them not being covered by its literal meaning either. On the other hand, it may perhaps be more appropriate to explicitly adopt a new term in order to clearly signal that the law applies also to conduct harming selling market counterparties, which conduct moreover needs not ultimately harm final consumers.[185]

In either case, assigning intrinsic relevance to competitive harm to market counterparties is arguably reconcilable with the perspective that the objective of competition law is to protect the "competitive process"[186] or "competition as such,"[187] which perspective is common in EU competition law.[188] In fact, the focus on market counterparty harm can be seen as providing a useful limiting principle as to which restrictions of competition to regard as undesirable. Competition law is then "about protecting the competitive process and does so by considering the impact of conduct on those who trade with the allegedly anticompetitive actor."[189] Such a close link between the competitive process and counterparty welfare has been advanced for instance by Shapiro, who argues that U.S. law should be guided by the "protecting competition standard," whereby "[a] business practice is judged to be anticompetitive if it harms trading parties on the other side of the market as a result of disrupting the competitive process."[190]

[181] *See similarly* Zimmer, *supra* note 140, at 497.

[182] *Supra* notes 78–82 and accompanying text.

[183] Sillman, *supra* note 107, at 64.

[184] Marius Schwartz, Professor, Georgetown Univ., Address at Department of Justice and Federal Trade Commission Workshop on Merger Enforcement: Should Antitrust Assess Buyer Market Power Differently Than Seller Market Power? (Feb. 17, 2004) ("[T]he term 'consumers' is, in my view, a metaphor for 'trading partners'—be they buyers of the merging firms' products or sellers of inputs to them.").

[185] *Cf.* Shapiro, *supra* note 25, at 39 (observing that the term "consumer welfare" directs one's attention to final consumers, which is a distraction in cases with other market counterparties).

[186] *See, e.g.*, Hemphill & Rose, *supra* note 23, at 2091; Zimmer, *supra* note 140, at 500–01. *Cf.* Parret, *supra* note 43, at 340 ("[T]he protection of an effective competitive process might be the intermediary or instrumental goal, whereas consumer welfare can be the ultimate goal.").

[187] *See, e.g.*, Ezrachi & Ioannidou, *supra* note 13, at 73.

[188] *Id.*; Stylianou & Iacovides, *supra* note 36.

[189] Sillman, *supra* note 107, at 64.

[190] Shapiro, *supra* note 25, at 38–39.

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II. The Law Protects Individuals at the Edges of Supply Chains

Protecting all market counterparties themselves, as it was discussed in the previous section, means assigning intrinsic value to the welfare of these counterparties, even if they are actually businesses. Should such an approach be perceived too unorthodox, one may pursue a different line of argument, which excludes businesses from ultimate beneficiaries of competition law. That is to say that this line of argument—unlike the one discussed above—is based on the assumption that competition law does actually assign a special status to final consumers, ultimately trying to protect their well-being. One can then argue that the law should assign the same status also to workers because they resemble final consumers in crucial ways.[191] This section first discusses how these similarities justify the special treatment of workers. And, subsequently, the section presents further support to the proposition of treating worker harm in the same way as final-consumer harm based on how competition law applies to the own conduct of workers and final consumers.

1. Similarity Between Workers and Final Consumers

Both final consumers and workers are invariably individual people, which distinguishes them from producers and employers, who tend to be business corporations. The fact that individuals enjoy a special position in competition law has been recognized for instance by the United States Supreme Court, which observed in its *Sonotone* judgment that antitrust law is "primarily . . . a remedy for the people of the United States as individuals."[192] Former EU Commissioner for Competition Margrethe Vestager has then recently even distinguished the very restrictions of competition between employers, that is, buyers of labor, from those between buyers of other input by noting that the former "have a very direct effect on individuals . . . ."[193]

Admittedly, treating final consumers and workers distinctively due to their character as individual human beings is not without its problems because also businesses are owned by individual people—that is, shareholders—who effectively are the ultimate recipients of producer and employer welfare. It may thus perhaps be more precise to say that the law prioritizes protection of individuals who do not engage in commercial activity over those who do—through owning businesses. Advocate General Jacobs in this vein observed in *Albany* that "there is a significant functional difference between an employee and an undertaking providing services" among other things because "[e]mployees normally do not bear the direct commercial risk of a given transaction."[194] A different way of looking at the issue is that the economic interests of both workers and final consumers—unlike those of shareholders—are in a certain sense opposed to the businesses with which they interact.[195]

In addition, most workers—like most final consumers—are poorer than most shareholders.[196] We have already discussed that EU competition law's preference of consumer welfare over total welfare may be driven by its distributive favoring of final consumers over producers. Odudu observes that, similarly, "[l]abour can be seen as a group favoured against employers . . . ."[197]

[191]*Cf.* Taylor, *supra* note 88, at 34 ([A]rguments that courts and scholars have relied on to defend the consumer welfare standard for product market regulation tend to simultaneously support a worker welfare standard for labor market regulation.").

[192]Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977)). *See also* Alexander & Salop, *supra* note 9, at 291.

[193]Vestager, *supra* note 17.

[194]ECJ, Case C-67/96, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, ECLI:EU:C:1999:28 (Dec. 21, 1999), para. 215, https://curia.europa.eu/juris/liste.jsf?num=C-67/96.

[195]Masterman, *supra* note 75, at 1400–01.

[196]Posner & Sunstein, *supra* note 69, at 196, 202–03.

[197]Okeoghene Odudu, *The Distributional Consequences of Antitrust*, *in* HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST 605, 607–08 (Philip Marsden ed., 2006) (making this observation in the context of the *Albany* doctrine discussed in Section C.II.2 of the present Article).

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As a result, insofar as the embrace of consumer welfare as a goal of EU competition law is driven by an ambition to protect non-entrepreneurial individuals who are generally less well-off than the owners of the businesses that the individuals engage with, it seems only logical that worker welfare ought to be embraced, too.[198] That is to say that "[competition] law should be seen not merely as protecting consumers from producers, but also labor from capital."[199]

2. The Law Lets Workers Restrict Competition

The position that the law protects both final consumers and workers can be further supported on the basis of how the law treats the own conduct of these actors. Namely, EU competition law—like U.S. antitrust law[200]—allows workers to restrict competition between themselves, that is, on the selling side of labor markets, through collective action and, thus, to improve their welfare. As often argued, such collective action "could be construed as a labour *cartel*, fettering the operation of free market forces between [the workers] over the terms on which they offer their labour in the market for their services."[201] That is to say that certain workers' conduct is lawful under EU law even though the very same conduct would violate the law if it was performed by businesses. The law arguably operates in this way in order to promote the welfare of workers.

The immunity of collective worker action from EU competition rules is guaranteed primarily by a doctrine fashioned by the Court in case *Albany*.[202] There the Court famously recognized that, even though "certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers,"[203] such agreements fall outside the scope of Article 101(1) TFEU.[204] The condition is that the purpose of the agreement is "to improve conditions of work and employment,"[205] whereas such improvements encompass also better remuneration.[206] The *Albany* doctrine has been consistently upheld by later case law.[207]

[198] *Cf.* Taylor, *supra* note 88, at 40.

[199] Kim, *supra* note 61, at 433.

[200] *See, e.g.*, Posner & Sunstein, *supra* note 69, at 207.

[201] Shae McCrystal & Phil Syrpis, *Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union*, *in* VOICES AT WORK: CONTINUITY AND CHANGE IN THE COMMON LAW WORLD 421, 421 (Alan Bogg & Tonia Novitz eds., 2014) (emphasis added). *See also* Hafiz, *supra* note 103, at 387 (talking about "'workers' . . . 'cartel' activity"); Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1185 (1980) (treating a labor "union as a price-setting, market-allocating cartel of sellers of labor that accumulates and exercises monopoly power to better the position of its members"); Mariateresa Maggiolino, *Even Employees Are Undertakings in the Labour Market, But Granting Social Rights Is Not Antitrust's Job*, 10 J. ANTITRUST ENF'T 365, 393 (2022) ("[C]ollective agreements about wages . . . agreements are meant to impair the free play of supply and demand in the labour market."); Masterman, *supra* note 75, at 1416–17 (citing Brown v. Pro Football, Inc., 518 U.S. 231, 241 (1996)) ("[A] union is a combination of workers jointly setting wages and other work conditions, just as a cartel is a combination of firms setting prices together."); Odudu, *supra* note 197, at 607–08 ("Conceptually, workers organizing themselves together in a union to bargain for better pay and conditions form a cartel, competition is eliminated amongst the members, and those who seek the services of unionized workers are forced to pay them more.").

[202] *See Albany International BV*, Case C-67/96. Another line of case law says that workers are not undertakings, which is why competition law does not apply to their actions. *See* ECJ, Case C-22/98, Criminal Proceedings Against Jean Claude Becu, ECLI:EU:C:1999:419 (Sept. 16, 1999), https://curia.europa.eu/juris/liste.jsf?num=C-22/98. This is nevertheless interpreted to apply only to collective action of *current* employees against their *single* employer. *See* Giorgio Monti, *Collective Labour Agreements and EU Competition Law: Five Reconfigurations*, 17 EUR. COMPETITION J. 714, 715 (2021).

[203] *Albany International BV*, Case C-67/96 at para. 59.

[204] *Id.* at para. 60.

[205] *Id.* at para. 59.

[206] *Id.* at para. 63.

[207] *See, e.g.*, ECJ, Case C-222/98, Van der Woude v. Stichting Breatrixoord, ECLI:EU:C:2000:475 (Sept. 21, 1999), https://curia.europa.eu/juris/liste.jsf?num=C-222/98; ECJ, Case C-413/13, FNV Kunsten Informatie en Media v. Staat der Nederlanden, ECLI:EU:C:2014:2411 (Sept. 4, 2014), https://curia.europa.eu/juris/liste.jsf?num=C-413/13.

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The exception of collective labor action from competition law may be harmful to downstream buyers, potentially including final consumers.[208] To be sure, under some circumstances unionization and the ensuing wage increases may benefit the buyers. This will be the case when the wage rate increases from a sub-competitive level, that is, when employers have power on the given labor market.[209] Coordination among workers will then countervail this power.[210] The negotiated higher wage rate will mean that more people will be willing to work.[211] And this will then translate into increased production[212]—and thus lower price—for buyers down the stream.

Nevertheless, if wages are not suppressed to start with, labor organizing to negotiate higher wages will likely increase downstream prices and decrease output.[213] This is because, as in the case of too low wages,[214] fewer people will get employed. Only this time the effect will be driven by the reaction of employers: They will not be willing to employ as many workers as without the inflated wage. And, as discussed above, fewer employees mean lower product output, which in turn generally means higher prices and lower welfare for buyers. The same effect may obtain also if employers do actually have market power but, at the same time, the power of organized workers is so much greater that it not only countervails the employer power but raises wages so high that even fewer workers get employed than if the wages were as low as employers would wish.[215] This is all to say that the exemption of labor coordination from EU competition law may not always benefit final consumers.

This potential harmful effect of collective worker action on final consumers can be illustrated by the U.S. antitrust case *Meat Cutters v. Jewel Tea Co.*[216] The case concerned a collective bargaining agreement between a food store and unionized butchers that limited the operating hours of the store's meat departments. The Supreme Court concluded that the agreement was covered by the exemption of union-employer agreements from antitrust law even though it effectively harmed final consumers by limiting when they could do their shopping.

The fact that the immunity applies to collective worker action regardless of its effect on consumers suggests that the law does care about the welfare of workers as such, and not only as a proxy for the welfare of consumers. Kim argues that this is indeed the case in the United States.[217] One could perhaps understand the immunity for collective action by workers as a mirror image of the immunity for collective action by final consumers. Namely, EU competition law does not

[208] *See, e.g.*, Hovenkamp, *supra* note 6, at 529; Kim, *supra* note 61, at 433 ("From the consumer welfare perspective, labor organizing may be detrimental because it can lead to increased consumer good prices and restricted output.").

[209] *See* Kim, *supra* note 61, at 444.

[210] *See id.* at 433–34; Maggiolino, *supra* note 201, at 394–95.

[211] *See* Melamed & Salop, *supra* note 165, at 13.

[212] *See* Kim, *supra* note 61, at 444. *Cf.* Hovenkamp, *supra* note 6, at 518–19 (discussing this effect with regard to minimum wage laws).

[213] Kim, *supra* note 61, at 444; Herbert Hovenkamp, Competition Policy for Labour Markets 2 (2019) ("[L]abour cartels, including some of the activities of labour unions, tend to raise the costs of labour and may have an upward effect on product prices."); Hovenkamp, *supra* note 6, at 518 ("[I]f workers were being paid their marginal product, then a forced wage increase should lead to less production."); Pascal McDougall, *Foregrounding Distributive Justice in European Labour Antitrust*, *in* Competition Law and Economic Inequality 287, 294 (Jan Broulík & Katalin Cseres eds., 2022).

[214] *See supra* note 99 and accompanying text.

[215] Taylor, *supra* note 88, at 24–25.

[216] *See* Loc. Union No. 189, Amalgamated Meat Cutters, & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co., 381 U.S. 676 (1965).

[217] *See* Kim, *supra* note 61, at 446 ("Within the labor supply context, legislative text and history indicate that worker welfare strictly trumps consumer welfare."). Laura Alexander, in her report for the American Antitrust Institute, explains:

> Antitrust exemptions, such as labor unions . . . for example, represent a policy decision to bolster the bargaining leverage of workers . . . because we, as a society, determined that it is in our best interest to prioritize the living standards of these groups over competition in affected labor and agricultural markets. Allowing these groups to exercise countervailing power is viewed as a means toward that end.

Laura M. Alexander, Am. Antiturst Inst., Countervailing Power: A Comprehensive Assessment of a Persistent But Troubling Idea 6 (2020).

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apply to the conduct of final consumers.[218] Eventual buying cartels among such consumers do thus not violate competition rules[219] even if they actually harm their suppliers and reduce efficiency.[220] The exclusion of coordination among workers from competition law may then be seen as the same maneuver, just at the other end of the supply chain: Competition law allows restrictions of competition between non-entrepreneur individuals at the very edges of supply chains in order to promote the welfare of these individuals.[221]

To be sure, one could once again argue that EU competition law does allow workers to improve their welfare by restricting competition only in order to, ultimately, benefit—final—consumers.[222] This argument is based on the assumption that the interests of workers and consumers are aligned so often that the occasional conflict is acceptable.[223] The question how frequently such conflicts actually arise, nevertheless, "has received very little theoretical and empirical examination."[224] Moreover, the EU Courts have "expressly established that cartels meant to react to unfair competition practices are unlawful ...."[225] It is then a question why such cartels would not be justified by consumer welfare while worker cartels would. And, in any case, there is no basis for this interpretation in the law, with the Court's motivation for the *Albany* exception not mentioning consumers at all. Rather, the Court says that competition law needs to be disapplied so that it does not stay in the way of social policy objectives that concern workers themselves.

The fact that the law allows workers to restrict competition for their own benefit can be advanced in support of the law recognizing competitive harm suffered by workers as relevant in itself. More specifically, as shown in this section, *an increase* in worker welfare by restricting competition between workers does already serve as a *shield* against being found in violation of the law. There is then no apparent reason why *a decrease* in worker welfare following from a

[218]This is because the law does not consider purchasing of goods and services for final consumption an economic activity, which means that final consumers do not constitute undertakings. *See* Daskalova, *supra* note 150, at 121; WHISH & BAILEY, *supra* note 38, at 88.

[219]Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement* (DOJ Antitrust Division, Economic Analysis Group Discussion Paper) (June 2007), https://www.justice.gov/atr/consumer-surplus-appropriate-standard-antitrust-enforcement.

[220]*See* John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 597 (2022). Newman explains:

> Downstream coordination can decrease output, yet increase consumer welfare. If a group of consumers gains buying power and demands lower prices, standard economic theory predicts that output will fall. At the same time, the standard assumption is that those consumers' welfare will increase—or else they would not have entered into the agreement in the first place. A consumer cartel will almost certainly increase consumer welfare. The upshot is that, here again, output can decrease while consumer welfare increases.

Id. (internal citations omitted).

[221]The European Commission seems to similarly favor even individual people who are actually not workers because they are not fully integrated into the business of their principal but who still primarily rely on their personal labor to make living and are not entirely independent of their principal or lack sufficient bargaining power. *See* Commission Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons, paras. 8, 20, 32, 2022 O.J. (C 374) 2, 3–4, 7, 10 (EU).

[222]Monti, *supra* note 202, at 716.

[223]*Id.*

[224]Taylor, *supra* note 88, at 25. Eric Posner examines this phenomenon, as well:

> There is a surprisingly sparse literature on the relationship between the union wage premium and the competitive wage rate. While most economists agree that unions raise wages for their members, there are few high-quality studies that show their impact on productivity, employment, and other measures of their contribution to social value.

Eric A. Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389, 402 n.49 (2022). *Cf.* Hovenkamp, *supra* note 6, at 519 ("[A]ny serious debate about the impact of raising the minimum wage must consider where current wages lie in relation to the marginal productivity of the labor that is involved.").

[225]Maggiolino, *supra* note 201201, at 395 (citing ECJ, Case T-14/89, Montedipe SpA v. Comm'n, ECLI:EU:T:1992:36 (Mar. 10, 1992), paras. 289–97, https://curia.europa.eu/juris/liste.jsf?num=T-14/89).

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restriction of competition on the other side of the labor market should not play the role of a *sword*, that is, make this restriction in principle infringe EU competition law.[226] Or, to put it differently, when it comes to final consumers, EU competition law allows them to restrict competition between themselves as well as protects them from harmful restrictions of competition between their market counterparties, that is, sellers of final goods and services. So why would only the former but not the latter hold for workers?

D. Conclusion

There are many compelling reasons to treat competitive harm inflicted upon workers by employers as intrinsically relevant under EU competition law. Generally speaking, "[t]here is no a priori reason for thinking that worker harm is less severe than consumer harm."[227] Quite to the contrary. Workers tend to be disadvantaged in their relationships with employers by the unique frictions that exist in labor markets such as the costs of searching jobs or of moving.[228] Crucially, most people receive income primarily from work,[229] and this dependence on wage to buy what they need[230] puts workers in a weaker position still.[231] For many, being able to negotiate a fair wage is even a matter of survival.[232] Insofar as restrictions of competition between employers harm primarily those less well-off, they may also exacerbate economic inequality.[233] Further, most of us spend significant part of our time at work, which is why not just lower wages but also other worsened working conditions may greatly impair our well-being.[234] And, last but not least, people derive from work also all sorts of other benefits that may wane when employers are insufficiently constrained by competitors: "[S]tatus, a sense of meaning, important personal relationships, and mental health benefits."[235]

As shown by this Article, it also possible to make arguments for the intrinsic relevance of worker harm to EU competition law that are more firmly embedded in the framework of the law, ostensibly based on the consumer welfare paradigm. The first possible line of argument concerns not only workers but all market counterparties of businesses that restrict competition. EU competition law often intervenes in cases where the market counterparties are not final consumers but business buyers or sellers, including workers. The law may then well be protecting these market counterparties themselves rather than caring about the harm eventually ensuing to final consumers. Alternatively, it is possible to argue that workers resemble final consumers by being non-entrepreneurial individuals at the edges of supply chains who tend to be poorer than shareholders and that the ultimate objective warranting the intervention of EU competition law is the protection of such individuals.[236] This perspective is supported also by the fact that the law allows workers, just like final consumers, to restrict competition between themselves.

[226] A possible counterargument against this argumentative move is that that the reason why competition law exempts collective labor agreements from its scope in the first place does not have to do with the welfare of workers but with some other—labor law—objective.

[227] Hovenkamp, *supra* note 6, at 543 (citing Naidu et al., *supra* note 5, at 555–61).

[228] Kim, *supra* note 61, at 445.

[229] *See* Sillman, *supra* note 107, at 64 ("In our economy where most people get most of their income from work, intentional indifference to the welfare of workers seems unwise.").

[230] Posner, *supra* note 5, at 266.

[231] Kim, *supra* note 61, at 439.

[232] *Id.* at 445.

[233] *See supra* note 11 and accompanying text.

[234] Posner, *supra* note 5, at 271.

[235] *Id.*

[236] A somewhat similar proposition has been advanced by Cengiz:

> [T]his paper suggests a *citizen* (rather than consumer) *welfare* standard that takes into consideration the economic effects of anti-competitive behaviour on consumers as well as workers. The citizen welfare standard could also be applied in other cases where competition rules and principles come into conflict with public interest or other policy

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This Article has discussed whether competitive harm inflicted by employers upon workers should be considered as relevant in itself, arguing in the affirmative. Even if that is the case, nevertheless, it is still a question whether such harm can be offset by eventual benefits to downstream consumers. While this question does in many ways relate to the discussion here, the underlying issue of balancing competitive effects across different markets is a complex one and arguably requires a separate analysis. Still, to provide at least a provisional assessment, it seems that there are sound arguments in favor of worker harm in principle not being offsetable by consumer benefits. Consider for instance the abovementioned[237] remark in the Competition Policy Brief that "cost savings that arise from the mere exercise of market power cannot be taken into account as source of possible pro-competitive effects."[238] This point has been made in the context of U.S. antitrust for instance by Posner: "Antitrust law prohibits anticompetitive behavior that causes harm to market participants that it targets; it doesn't matter whether others are incidentally benefited or not."[239] It is nevertheless also true that the Commission horizontal cooperation guidelines do make the general remark that buying power resulting from buyer agreements does not give rise to competition concerns in the first place if it leads to "lower prices, more variety or better quality products for consumers."[240] Similarly, the horizontal merger guidelines say that increased buying power may be desirable if the lower input costs are "passed onto consumers in the form of lower prices."[241] All in all, a further inquiry into the EU Courts' case law, the Commission's decision-making practice and soft law as well as scholarship is necessary to fully understand the role of consumer benefits in cases against employers.

In any case, there has so far been virtually no enforcement or rule-making under EU competition law at the level of the Union against employers.[242] This lack of action becomes particularly peculiar when compared with the situation in the United States. To be sure, even there interventions against restrictions of competition between employers have not been that common.[243] Still, the tide has clearly turned over the last decade and the two federal competition authorities have been increasingly active in this area.[244] They have for instance been intervening against no-poach agreements[245] and inserted provisions concerning labor markets in the merger guidelines.[246] What is more, such interventions have been motivated by the welfare of workers themselves.[247] The discrepancy between the approach of EU and U.S. competition law to labor

objectives, such as cases involving industrial policy, environmental policy or other social objectives in which competition authorities and courts are yet to produce a consistent approach. As a result, in these cases, competition authorities and courts would be able to look at how the specific behaviour in question affects citizens in their entirety as a holistic group, rather than focusing on the interests of the narrow category of consumers.

Cengiz, *supra* note 8, at 88 (internal citation omitted). Like the present Article, despite talking about the impact on "citizens in their entirety as a holistic group," Cengiz seems to consider irrelevant the welfare of shareholders, also known as producer surplus. Her inclusion of "public interest [and] other policy objectives" nevertheless in any case goes further than what is being argued here.

[237] *See supra* notes 161–163 and accompanying text.

[238] Aresu et al., *supra* note 161, at 7.

[239] Posner, *supra* note 5, at 264. *See also* Alexander & Salop, *supra* note 9.

[240] *Guidelines on Horizontal Cooperation*, *supra* note 53, at para. 275.

[241] *EU Horizontal Merger Guidelines*, *supra* note 56, at para. 62.

[242] *See supra* notes 17–18 and accompanying text.

[243] *See* Araki et al., *supra* note 15 ("Even in the U.S . . . . the number of antitrust cases related to labor markets remains disproportionately lower than for product markets."); Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 59 J. HUM. RES. S284, S296 (2022) (arguing that antitrust in labor markets has been "shamefully neglected").

[244] *See* Araki et al., *supra* note 15 ("[I]n the U.S . . . . competition authorities have been acting more aggressively to tackle employer monopsony power . . . ."); Kim, *supra* note 61, at 445 (observing that US antitrust agencies have begun to respond to a call for action with regard to employer market power); Naidu et al., *supra* note 5, at 571–72; Sillman, *supra* note 107, at 39.

[245] *See* Kim, *supra* note 61, at 445; Naidu et al., *supra* note 5, at 544.

[246] *See* U.S. DEP'T JUST. & FED. TRADE COMM'N, *supra* note 169, at § 2.10.

[247] *See* Kuhn et al., *supra* note 26, at 15 ("[I]n the US, concern for labor market effects has broadened beyond impacts on horizontal competition to concern for the welfare of laborers themselves . . . ."); Taylor, *supra* note 88, at 34 ("Considerable

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markets is all the more remarkable given that in other areas of the economy it is actually the former that tends to be more interventionist. One should also not forget that the consumer welfare paradigm—supposedly standing in the way of protecting European workers by competition law[248]—has been imported to Europe from the very United States. One may therefore wonder whether the Union, and in particular the Commission, isn't being more Catholic than the Pope.[249] It would certainly seem so if we did not see action to protect workers through competition law soon and if this action was not warranted by harm to workers as such.

Let us conclude this Article by applying its message to a passage from the Commission's recent Competition Policy Brief on labor markets. The passage reads as follows:

> From an economic point of view, wage-fixing is detrimental to employees, whose wages and other benefits are depressed. Wage-fixing firms maximize joint profits by setting wages equal to the monopsony wage level via a reduction of labour demand, with the side effect of reducing output and increasing downstream prices to the detriment of consumers.[250]

As regards the notion of the "side effect," one could perhaps argue that an eventual negative effect of employer conduct on consumers is only secondary in the sense that consumers do not find themselves on the market on which competition is being restricted. The law could then still intervene against the employer conduct as the source of the undesirable side effect even if the ultimate objective of competition law was only the protection of consumers. Nevertheless, this Article suggests a different interpretation: The negative effects of employer conduct on consumers are only side effects in the sense that they do not matter for whether the conduct is unlawful. It is enough that there is harm to workers.

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scholarship shows that traditional antitrust principles, and some caselaw, already support recognizing that worker welfare is an independent antitrust concern.").

[248] *See supra* note 25 and accompanying text.

[249] *See* Stucke, *supra* note 102, at 1546 ("[T]he United States—a leading cheerleader of the consumer welfare objective—does not use consumer welfare to screen buyer-power claims."); Posner, *supra* note 224, at 401 ("[T]he consumer welfare standard in antitrust law does not block claims by workers.").

[250] Aresu et al., *supra* note 161, at 2.

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